IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JESSICA BERGER, TIMOTHY RENDAK, AND PATRICK MCCUMBER, ET AL **Plaintiffs,** **v.** **PERRY'S STEAKHOUSE OF ILLINOIS, LLC, ET AL** **Defendants.**	**Case No: 1:14-cv-08543** **Judge: Thomas M. Durkin** **Magistrate Judge: Sheila M. Finnegan**

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL INSPECTION

DEFENDANTS PERRY'S STEAKHOUSE OF ILLINOIS, LLC ("PSI"), et al respond to Plaintiffs' Motion to Compel Inspection ("Motion") as follows:

I. SUMMARY OF ARGUMENT

Plaintiffs' ongoing discontent with the discovery process emanates not from a failure by Defendants to respond appropriately and comprehensively but rather from Plaintiffs' frustration at the lack of support for their claims in Defendants' documentation. To vent this frustration, Plaintiffs now contend that the modulated (and proportional) "three December" approach established by the Court, within which they have operated for several months, did not actually provide them with any information about available electronic reports, such that they allegedly now need to scour PSI's entire database indiscriminately. In actuality, Defendants have provided to Plaintiffs the documentation (whether electronic or otherwise) they have requested, which complies with the Federal Rules' new proportionality standard. Defendants therefore contend that Plaintiffs have failed to demonstrate their entitlement to the radically intrusive and overly expansive discovery option of "inspecting" PSI's entire computer system.

Thus, their Motion should be denied.

II. BACKGROUND FACTS

A. INTRODUCTION

To counteract the "attitude" which undergirds Plaintiffs' discovery approach in this case, as exemplified by the Motion,[1] Defendants consider it appropriate first to place in context the issues in this lawsuit and the backdrop against which discovery is being conducted, particularly given this Court's philosophy of focusing upon "three Decembers" worth of Defendants' operations as a means by which to provide samples of discoverable data (in electronic and documentary format) so as to balance the burdens imposed upon Defendants in the discovery process with the benefits sought by Plaintiffs therefrom.

Accordingly, as demonstrated below, and as the Court is aware, Defendants have identified responsive documents for the discovery requests available for the three Decembers, have further identified the format in which the documents exist, and have informed Plaintiffs of the existence of such documents, as well as producing over 7,400 pages of such documents either electronically or in hard copy.

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[1] The Court should note the attitude which pervades the Motion, which is essentially (metaphorically) "don't just bake me a cake, set the table, instruct me on how to find the silverware and plates, slice the cake, serve me a piece, and then show me how to eat the cake." That attitude is nowhere more prevalent than in the following quote from footnote 8 of the Motion (Motion at page 10, note 8):

> It is mind-boggling that Defendants would actually contend that Plaintiffs should be required to do their own calculations for ***each*** server for ***each*** shift worked ***when these calculations are already contained on the Checkout receipts and therefore readily available in electronic format***.

Prefatorily, the "checkout receipts" identified are only available in hard copy (as previously represented to the Court), not "readily available in electronic format as Plaintiffs erroneously assert. More importantly, one of the reports produced electronically by Defendants, at Plaintiffs' insistence, was the so-called "Daily Activity Report" [PERRYS 07269-7405]. This Report listed electronically all of the servers who worked on any given daily shift, showing their total tip earnings for that shift. Because this report was produced in Excel format, it presented Plaintiffs with the opportunity to analyze the data contained therein in a variety of ways, including simply hitting the "Σ" (summary) key to ascertain the result of daily or more frequent earnings by servers, and their respective tip shares.

Defendants also produced hard copies showing totals for tips earned, etc., but have presumed that Plaintiffs wanted information in an electronic format so as to be able to conduct different types of analysis on such data.

Rather than adhere to the guidelines established by the Court when it first directed the "three December approach" to be used, Plaintiffs now seek by the Motion to ignore this entire approach, supplanted by their effort to obtain access to PSI's entire database, irrespective of whether the vast majority of such documents have anything to do with the matters at issue in this lawsuit.

B. Plaintiffs' Claims

1. The Counts in the Complaint

1. Context begins with describing Plaintiffs' claims.

2. As described at the beginning of the their latest operative Complaint, *see* Plaintiffs' Fourth Amended Complaint (***Dkt. No. 121***), at pages 1-4, Plaintiffs generally assert the following claims:

(a) Count I -- Improper distribution of minimum wages in violation of the FLSA;

(b) Count II -- Improper distribution of minimum wages in violation of the Illinois Minimum Wage Law ("IMWL");

(c) Count III -- Violation of the Illinois Wage Payment and Collection Act ("IWPCA");

(d) Count IV -- Breach of Contract under Illinois common law; and

(e) Count V -- Unjust enrichment under Illinois common law.

2. Particular Factual Allegations Related to Each Count

1. **Count I (FLSA)**. The factual allegations invoked by Plaintiffs to support their claim of FLSA violation in Count I are the following:

(a) Failure to provide proper notice to Servers about how the tipping process at Perry's worked (Complaint ¶¶57 at p. 11, 92-93 at pp. 16-17);

(b) Failure to distribute all tip pool proceeds taken from servers to eligible tip pool recipients but, instead, retained "by the house" (Complaint ¶¶59 at p. 11, 75-76 at p. 14);

(c) Calculating tip pool contributions based upon the inflated total of all items provided to customers, whether paid for by customers or not (Complaint ¶63 at p. 11);

(d) Charging servers a credit card offset fee for credit card charges where servers are cashed out on a nightly basis in excess of the amount necessary to reasonably reimburse PSI for the total expenditures associated with credit card tip collections and processing (Complaint ¶¶77-78 at p. 14);[2]

(e) Requiring servers to forfeit any tip on bills paid by credit card where the customer did not sign the credit card receipt (Complaint ¶¶80-83 at pp. 14-15);

(f) Imposing a mandatory service charge for large parties and private events, and then assessing a tip pool contribution on such proceeds (Complaint ¶¶84-91 at pp. 15-16); and

(g) Requiring servers to perform duties not directly related to being a server (Complaint ¶¶112-120 at pp. 19-20).[3]

2. **COUNT II (IMWL)**. The factual allegations invoked by Plaintiffs in Count II to support their claim of IMWL violations essentially mirrors or reiterates the alleged underlying conduct stated in Count I. (Complaint ¶¶150-173 at pp. 24-26).

3. **COUNT III (IWPCA)**. In Count III, Plaintiffs allege that Defendants have willfully violated the IWPCA by making improper deductions from servers' wages (Complaint ¶175 at p. 27), and by not paying the "promised" portion of service charges (Complaint ¶186 at p. 28).

4. **COUNT IV (BREACH OF CONTRACT)**. In Count IV, Plaintiffs allege: (a) that there was an agreement to serve customers in exchange for hourly wages from PSI and tip money from PSI customers (Complaint ¶189 at p. 29); (b) that PSI advised Plaintiffs that it was taking a portion of their tip money in order to give that money to other tipped employees who customarily and regularly receive tips (Complaint ¶191 at p. 29); (c) that PSI did not give all of the tip money to such recipients (Complaint ¶195 at p. 29); (d) that PSI also agreed to provide compensation to

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[2] Defendants have previously identified for the Court and Plaintiffs that PSI ceased assessing a credit card offset fee to servers when it ceased the practice of nightly cashing out of servers' credit card tips in early October, 2014. It therefore has no documentation pertaining to assessing credit card offset fees after early October, 2014.

[3] Following the allegations in the enumerated Paragraphs, Plaintiffs then assert the companion FLSA violations in the section labeled "Count I" of the Complaint (Complaint ¶¶121-141 at pp. 20-22).

Plaintiffs for working private events and large parties but broke its agreement (Complaint ¶198-200 at p. 30); and (e) that PSI therefore breached its agreement with Plaintiffs. They do not assert any documentary proof of this beyond what is already alleged above.

5. **COUNT V (UNJUST ENRICHMENT)**. In Count V, Plaintiffs reiterate their allegations of failure to distribute properly all tip money so as to be unjustly enriched, *see* Complaint ¶¶205-214, but do not identify any additional documentation bearing upon this claim.

III. DISCOVERY PROVIDED BY DEFENDANTS

A. INTRODUCTION

During the course of discovery, Defendants have provided to Plaintiffs more than 7,400 pages of discovery, either in "hard copy" or in electronic form. This production includes all of the documents pertaining to the three (3) originally named plaintiffs and the then twelve (12) opt-in claimants for the entire period of November, 2013 (when PSI first opened for operation) through October, 2014; in the wake of this Court's "three Decembers" proportional sample approach, this production also includes information about all servers and all tip pool participants who were employed at PSI for the three Decembers (2013, 2014 and 2015).

B. DOCUMENTATION PROVIDED BY CATEGORY

Defendants contend that the documentation produced to date provides Plaintiffs the information they need to pursue their claims without having to impose upon Defendants the extremely intrusive step of Plaintiffs' proposed "database inspection."

1. Documents Regarding Failure to Distribute All Tip Pool Proceeds

Claim Documents	Produced
POS (November 2013 to October 2014) [PERRYS002669-4820]	12/11/2015
POS of Guy Redding (December 2013 & 2014) [PERRYS007258-7268]	08/19/2016
Assigned Checkouts Reports (November 2013 to October 2014) [PERRYS001477-1575]	12/11/2015
Assigned Checkout Reports (December 2013, 2014, & 2015) [PERRYS006149-6345]	08/19/2016

Claim Documents	Produced
Payroll Reports (November 2013 to October 2014) [PERRYS001883-2079]	12/11/2015
Payroll Reports – Aloha (December 2013, 2014, & 2015) [PERRYS004847-5869]	06/21/2016
Payroll Report– ADP (December 2015) [PERRYS005870-6029]	06/21/2016
Payroll Report/Check Register – Paycom (December 2013) [PERRYS006346-6388]	08/19/2016
Payroll Report/Check Register – ADP (December 2014) [PERRYS006389-6489]	08/19/2016
Tip Income Reports (December 2013, 2014, & 2015) [PERRYS006095-6134]	06/21/2016
Payroll Checks for named Plaintiffs (October 2013 to October 2014) [PERRYS002080-2378]	12/11/2015
Earning Statements and Checks (December 2013, 2104, & 2015) [PERRYS006490-7257]	08/19/2016

2. Calculating Tip Pool Contributions Whether Paid by Customers or Not

Claim Documents	Produced
POS (November 2013 to October 2014)	12/11/2015
Select POS of Guy Redding (December 2013 & 2014)	08/19/2016
Assigned Checkouts Reports (November 2013 to October 2014)	12/11/2015
Assigned Checkout Reports (December 2013, 2014, & 2015)	08/19/2016
Daily Activity Reports (December 2013, 2014, & 2015)	08/17/2016

3. Forfeiting Tips on Credit Card Bills With No Signed Receipt

Claim Documents	Produced
Employee Handbooks (2013 & 2014)	07/22/2015
Server Development Guide (04/19/2013 & 07/02/2014)	07/22/2015

4. Charging Servers Credit Card Offset Fee/ Cashed Out on a Nightly Basis

Claim Documents	Produced
POS (November 2013 to October 2014)	12/11/2015
Select POS of Guy Redding (December 2013 & 2014)	08/19/2016

5. Mandatory Service Charge for Large Parties/Private Events and Then Assessing Tip Pool Contribution

Claim Documents	Produced
Captain Sheets (2013 & 2014)	12/11/2015

6. Requiring Servers to Perform Duties Not Directly Related to Server Work

Claim Documents	Produced
Employee Handbooks (2013 & 2014)	07/22/2015
Server Development Guide (04/19/2013 & 07/02/2014)	07/22/2015

IV. AVAILABLE ELECTRONIC INFORMATION

A. Introduction

Defendants have previously indicated that they were willing to produce all responsive documents by hard copy. Plaintiffs rejected this, insisting that they were entitled to all information in electronic form. Defendants replied to Plaintiffs (and to the Court) that Defendants did not and do not have all requested documentation in electronic form, but would nevertheless produce in electronic form the documentation it did have in such form.

B. Declarations by PSI Regarding Available Electronic Information

The Court ordered Defendants to identify for Plaintiffs which information was or was not available electronically. In response, Defendants provided to Plaintiffs two Declarations by Derek Pearson, the Chief Financial Officer for the parent entity of PSI that provides PSI with administrative services.

Plaintiffs have the capability on the electronic documents produced in Excel spreadsheet format to perform calculations, where appropriate or desired, and Plaintiffs only need to run cumulative totals, if anything (a simple Excel task). *See* footnote 1, *supra*.

C. Hypothetical Claims of Unproduced Electronic Information

1. July 20 Conference Call

1. Plaintiffs have been unsatisfied with this information, and at their insistence, Defendants participated with them in a conference call on or about July 20, 2016, which also included a consultant Plaintiffs had retained to analyze the so-called Aloha System PSI utilizes for

recording point-of-sale transactions. Basing his conclusions on his analysis of the Aloha website, which describes a variety of different types of software marketed by Aloha for restaurant operations, the consultant opined that there should be many different electronic reports generated by PSI that are available on the Aloha System.

2. What the consultant did not understand, and what was explained to him and Plaintiffs' counsel during the conference call, was that PSI does not utilize all of the Aloha software that is available, but only those few software packages of particular use to PSI's specific operation. As a result, there is considerably less electronically stored information available than being postulated by Plaintiffs.

2. Overstatement of ESI Professional's Capabilities and Concerns Raised by ESI Professional's Lack of Qualifications as Revealed During the July 20 Conference Call

1. Defendants would also bring to the Court's attention the serious concerns undersigned counsel expressed during the July 20 Conference Call about the "ESI Professional" who participated in the Call as Plaintiffs' consultant.

2. For example, the ESI Professional acknowledged during the Call that he had no experience in matters involving FLSA litigation in general, or involving server tip procedures in particular, whether tip pools, tip contributions or tip sharing.

3. Rather, according to him, his experience was in dealing with "Open Table," which (generally speaking) is a computer software program that enables customers of a restaurant to reserve online a table at that restaurant at a particular date and time.[4]

4. Further, the ESI Professional based his knowledge upon his reading of the website of the software manufacturer (Aloha) that created the software. What the ESI Professional did not know, or understand, was that PSI did not utilize all of the Aloha software options available,

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[4] See *http://www.opentable.com/chicago-restaurants*.

but rather only a select few.

5. Undersigned counsel expressed to the consultant during the latter part of the Call that it appeared the consultant was advocating a total imaging of PSI's computer server because he was principally interested in generating revenue for himself.

6. The Court should view with skepticism any plan proposed by Plaintiffs which essentially places PSI's database in the hands of such a "professional."

3. Joint Status Report of July 27

1. One result of the July 20 Conference Call was the joint preparation and filing of a Joint Status Report to the Court on July 27. ***Dkt. No*. *156***.

2. While the document speaks for itself, for purposes of this Response, Defendants consider it appropriate to focus upon those portions of the Joint Report that Plaintiffs omitted from their Motion, including the following:

> The Parties disagree on whether Plaintiffs' expert should be permitted to enter Defendants' property to make a forensic image of Defendants' computer system, or supervise or monitor such activity.
>
> Defendants' position is that allowing the actions proposed by Plaintiff would have the effect of turning over what is virtually their entire business records to an agent hired by an adverse party, and be forced to trust that the agent (and the adverse party) would not do anything inappropriate with the information or use it for inappropriate purposes, including information that is considered confidential by customers.
>
> Moreover, because the information would be so incredibly useful to competitors, and because some of the Plaintiffs are now employed by competitors, that risk is very real.
>
> In addition, it would be incredibly difficult for the Defendants to even know (let alone prove) that such actions were taken. Accordingly, Defendants take the security of their business information very seriously.
>
> In addition, the Parties disagree on whether it is necessary for Defendants to produce their entire POS database to Plaintiffs' expert. Instead, Defendants have requested that Plaintiffs identify the specific queries that they believe should be run against the pertinent files in the database and, to the extent those queries seek information that is relevant or designed to

lead to the discovery of relevant information, Defendants will then arrange for the queries to be run and produce to Plaintiffs' counsel the results.

4. Plaintiffs' Queries

1. Despite protesting that they were unable to "provide technical queries" without access to the database, when "push came to shove," Plaintiffs' counsel submitted an e-mail on July 22, 2016, (attached as Attachment "A") that identified an extensive list of "queries."

2. In response to those queries, PSI endeavored to respond to each such query, and through undersigned counsel, delivered to Plaintiffs' counsel a Memorandum dated August 16, 2016, attached as Attachment "B."

3. As the Court will see from Attachment "B," PSI responded in detail to each of Plaintiffs' queries, identifying for which queries there were available electronic documents containing the requested information. *See* Attachment "B" at pp. 2-4. There is no legitimate showing that PSI is unable to respond further to any additional targeted and pertinent queries from Plaintiffs, and certainly none to justify scrapping the "three December approach" altogether.

4. Undersigned counsel further identified for Plaintiffs' counsel additional documentation responsive to the discovery requests that were available only in PDF or paper format.[5]

D. Credit Card Processing Data

1. Further, Plaintiffs highlight the category of "credit card processing data" as one example of electronic information allegedly available to PSI but not provided to Plaintiffs under its POS system. *See* Motion at 1. As shown in the above chart, all credit card sales entered into the computer system by a server are identifiable electronically on a daily cumulative basis, and

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[5] Eventually, Plaintiffs requested that these paper documents be made available for inspection and copying, rather than pay the costs Defendants projected for the copying and delivery directly. In response to Plaintiffs' request, the subject documents (numbering approximately 1,100 pages), were shipped by undersigned counsel to local counsel's office by overnight delivery towards the end of August. Local counsel (Jeff Fowler) then arranged with Plaintiffs' counsel for Plaintiffs to retrieve the documents and have them copied at a copying service chosen by Plaintiffs' counsel, which was accomplished.

such a report has been provided to Plaintiffs, identified in this litigation as **PERRYS002669-4820 and PERRYS007258-68)**.

2. However, it is important for the Court to understand that credit card ***processing*** data, that is the submission of credit card transactions for approval and crediting to PSI is not entered at the "Point of Sale," indeed, it is not "prepared by PSI at all."

3. Rather, the information concerning credit card ***processing*** fees imposed upon PSI is not available to it for several weeks after each transaction in question, and then only in a "batch" report. The only information available concerning credit card processing fees is information provided to PSI ***by an outside source*** (i.e., not on PSI's computer server), the clearinghouse that processes all credit card transactions. PSI receives a monthly report from this clearinghouse. The report is not transaction specific but, rather, "credit card processor specific."

CAVEAT: The Court should also note that as previously disclosed to Plaintiffs, PSI ceased the practice of assessing to servers a credit card offset fee for the privilege of having credit card tips cashed out on a nightly basis in early October, 2014, when it ceased the nightly cash out process and required all servers to be paid their cumulative tips thereafter by regular weekly paychecks. There are thus no documents in any format responsive to a request pertaining to credit card transactions after early October, 2014.[6]

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[6] One other issue merits a response. Plaintiffs assert in the Motion that Defendants have undertaken their course of action regarding discovery with either an absence of understanding their own computer systems, or with an intent to "obstruct and delay discovery matters (perhaps with an eye on the FLSA statute of limitations, which continues to run on the claims of many Perry's servers while Plaintiffs gather evidence for collective certification)." *See* Motion at page 13.

This assertion is wholly without merit.

When they sought leave to amend to file the Fourth Amended Complaint in February, 2016, *see* ***Dkt. No. 110***, Plaintiffs acknowledged that they were sufficiently informed enough about their claims in the case to seek to add "a new cause of action under the Illinois Wage Payment and Collection Act, as well as new theories of liability under the FLSA, Illinois Minimum Wage Law, and Illinois common law." *See* Motion for Leave to File Fourth Amended Complaint at 5, ¶23. They also represented to the Court that the Fourth Amended Complaint was needed "to ensure that the pleadings conform to the proof and assure that ***the relevancy of all discovery is more readily apparent to Defendants and the Court***." *Id.* at ¶29

V. ARGUMENT AND AUTHORITIES

A. PROPORTIONALITY REQUIREMENT OF RULE 26

1. FED. R. CIV. P. 26(b)(1) now establishes the proportionality standard for discovery that is incorporated into the Court's "three Decembers" approach and which should remain in place, stating:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

FED. R. CIV. P. 26(b)(1).

2. The "proportional" language in Rule 26 was designed to "rein in popular notions that anything relevant must be produced and to emphasize the judge's role in controlling discovery." *Noble Roman's, Inc. v. Hattenhauer Distrib. Co.*, No. 1:14-cv-01734-WTL-DML, 2016 U.S. Dist. LEXIS 38428, at *9 (S.D. Ind. Mar. 24, 2016). Courts are to determine the proportionality of discovery requests on a case by case basis, using the factors listed in Rule 26(b)(1). *Bell v. Reading Hosp.*, No. 13-5927, 2016 U.S. Dist. LEXIS 4643, at *4 (E.D. Pa. Jan.14, 2016).

3. Moreover, "even if discovery requests fall within the above scope of discovery, the court still may impose other limits because, for example, the discovery is unreasonably cumulative, can be obtained in a more convenient way, or the discovering party has already had

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(Emphasis Added).

In opposing the Motion for Leave to File, Defendants pointed out that Plaintiff Rendak testified at his deposition on December 18, 2015 that to prepare for his deposition, he reviewed documents provided by Defendants in responding to written discovery. Defendants also pointed out that the Fourth Amended Complaint added 75 paragraphs of contentions; interjected several new theories of alleged FLSA/IMWL liability not mentioned before, as well as several facts not previously mentioned or disclosed. *See* ***Dkt. No. 117*** at pages 3-4, Part II.C.1.

Defendants therefore dispute Plaintiffs' unsupported assertion that Defendants are intentionally conducting discovery so as to delay Plaintiffs in seeking certification.

ample opportunity to obtain what it is seeking." *Noble Roman's, Inc*., 2016 U.S. Dist. LEXIS 38428, at *14 (citing to FED. R. CIV. P. 26(b)(2)(C)).

4. The changes to FED. R. CIV. P. 26 were designed to limit the "liberal" approach to discovery. The new changes were "intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse." 2015 Notes to FED. R. CIV. P. 26 at ¶ 4. It is no longer sufficient for a party simply to claim that the requested discovery is relevant. *Noble Roman's, Inc*., 2016 U.S. Dist. LEXIS 38428, at *25. The parties—and the court—must now also consider the proportionality of the requested discovery. 2015 Notes to FED. R. CIV. P. at ¶ 9.

5. Here, Plaintiffs have sufficient information to move forward in this case. Anything beyond what has already been produced by Defendants is burdensome and not proportional to the current needs of the case.

6. The request for inspection in the instant Motion constitutes nothing more than an attempt to get around the previous three December limitations established by this Court.

B. RULE 34 DEFICIENCIES IN THE MOTION

1. FED. R. CIV. P. 34 provides that a request for inspection "describe with reasonable particularity each item or category to be inspected [.]" FED. R. CIV. P. 34 (b)(1)(A). To date, Plaintiffs have failed to do this (other than by the queries that Defendants have already answered as set forth above). Instead, Plaintiffs simply request that they be allowed access to Defendants' entire database, coupled with Plaintiffs' insistence that Defendants should just trust their designated professional.

2. Plaintiffs have couched their entitlement to accessing PSI's database, *writ large*, as being justified solely because of their dissatisfaction with the results yielded thus far in discovery. Defendants contend that this rationale does not constitute a sufficient ground to justify complete and unfettered access to Defendants' database. *See Mid Am. Sols. LLC v. Vantiv, Inc.*,

No. 1:16-mc-2, 2016 U.S. Dist. LEXIS 53106, at *24 (S.D. Ohio Apr. 20, 2016)(court denying Plaintiffs' request to inspect a third party's database because Plaintiffs did not demonstrate anything to question the accuracy of the information provided.).

C. Permissible Limits and Procedures on Document Requests

1. When examining discovery requests, a court can limit the requests if the information can be obtained in a more convenient way. *Noble Roman's, Inc.*, 2016 U.S. Dist. LEXIS 38428, at *14 (citing to FED. R. CIV. P. 26(b)(2)(C)).

2. Defendants contend that applicable authorities reject this kind of disproportionate approach. For example, in *Mid Am. Sols. LLC v. Vantiv, Inc.*, No. 1:16-mc-2, 2016 U.S. Dist. LEXIS 53106 (S.D. Ohio Apr. 20, 2016), the court denied Plaintiffs' request to inspect the computers of a third party. The third party had already produced documents relevant to Plaintiffs' request. However, instead of reviewing the documents and forming their own calculations regarding the data contained therein, Plaintiffs brought a motion to compel the third party to produce the documents in a condensed format, which made calculation easier, and also requested to inspect the third parties' computers because it questioned the accuracy of the information in the documents produced. The court denied Plaintiffs' request, ***stating that it can perform the calculations based on the documents already provided***. Moreover, inspection was not warranted because plaintiffs failed to demonstrate any basis which required inspection. This case stands as a stark rejection of Plaintiffs' underlying philosophy that Defendants are obligated not only to produce discoverable documents but also to produce them in the format desired by Plaintiffs to ease their review, even if such documents are not maintained in such a format in PSI's ordinary course of business. *Id*. at 21-22. Rules 26 and 34 impose no such burden on Defendants.

3. Here, Defendants not only offered to run searches themselves, they actually compiled the "queries" provided to them by Plaintiffs and produced Attachment "B" which specifi-

cally identifies documents already produced that are responsive to each "query."

4. Under the circumstances in this case, Defendants contend that this method yields the documentation it is (or should be) obligated to produce, given the claims involved, and is far superior to Plaintiffs' more intrusive approach of claiming the right to access to the entire database in order to determine what they want. This absolutist, disproportionate and unlimited approach is the very type of request that the discovery rules were designed to prevent.

D. PLAINTIFFS' SUPPORTING AUTHORITIES ARE DISTINGUISHABLE

1. *U.S., ex rel. Liotine v. CDW Gov't, Inc.* cited by Plaintiffs is distinguishable from the current case because the defendant in that case had already produced the requested information to another party. *See U.S., ex rel. Liotine v. CDW Gov't, Inc.*, No. 3:05-CV-33-DRH-DGW, 2011 WL 1576555, at *3 (S.D. Ill. Apr. 26, 2011). The Defendant simply did not want to re-produce it to the requesting party. That is not the case here, Defendants have already produced ESI documents to Plaintiffs and there is simply nothing left to produce. However, Plaintiffs cannot accept this answer and are not satisfied with the results.

2. *Osborne v. C.H. Robinson Company* is also distinguishable from the current situation. In that case, defendants played coy when performing its own queries into its own database. *See Osborne v. C.H. Robinson Co.*, No. 08 C 50165, 2011 WL 5076267, at *4 (N.D. Ill. Oct. 25, 2011) (Defendants limiting its queries to "Dixon Web" when that specific entity was referred to in Defendant's database as "Dixonweb Publishing" and/or "Dixon Direct.").

3. Here, Defendants have already run a very comprehensive listing of queries requested by Plaintiffs, yielding the identification and production of a significant number of documents. Defendants have also indicated a willingness (within reason) to run further queries. However, Plaintiffs have refused to provide Defendants with any queries.

VI. CONCLUSION

Defendants therefore contend that against the backdrop of what has occurred in this case, Plaintiffs' Motion to Compel Inspection fails to satisfy the FED. R. CIV. P. 26 and 34 standards and should be denied.

DATED this 17th day of October, 2016.

PERRY'S STEAKHOUSE OF ILLINOIS, L.L.C., HOWARD CORTES and JEFFREY PAGNOTTA

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CERTIFICATE OF SERVICE

I, Lionel M. Schooler, an attorney, hereby certify that on October 17, 2016, my office caused to be served a copy of the foregoing ***Response to Plaintiffs' Motion to Compel Inspection*** in the above-captioned matter to be filed with the Clerk of the District Court and served on the parties of record, including those listed below, by operation of the Court's CM/ECF electronic filing system, addressed to: Colleen M. McLaughlin and Gregory S. Dierdorf, Law Offices of Colleen M. McLaughlin, 1751 S. Naperville Rd., Ste. 209, Wheaton, Illinois 60187.

/s/ Lionel M. Schooler
Lionel M. Schooler